Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of **DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (*WEB IV*)**	**Docket No. 14-CRB-0001-WR (2016–2020)**

iHEARTMEDIA, INC.'S REPLY BRIEF REGARDING THE NOVEL LEGAL QUESTION REFERRED TO THE REGISTER ON DIFFERENT LICENSOR RATES

All of the services, record labels, and artists to submit timely comments — with the exception of the two largest record labels (Universal and Sony) — agree that Section 114 does *not* permit the Judges to set different rates and terms for different types of copyright holders. That position is consistent with *every* rate and term proposal submitted during this proceeding, all of which proposed rates that would apply equally to *all* copyright holders. It was also initially Universal and Sony's position, as they supported SoundExchange's proposal for a uniform rate for all copyright holders. Unhappy with that decision — now that the record is closed and the numerous voluntary direct licenses between statutory services and labels, including the third largest (Warner Music Group) and the "fourth major" (Merlin), show that the current rates are far too high — Universal and Sony want a do-over, so they can argue that Section 114 permits the Judges to set different (and, presumably, higher) rates for them than for all other copyright holders. The Register should reject their eleventh-hour change of heart. Universal and Sony's arguments are foreclosed by the text of Section 114, contrary to the manner in which the participants actually litigated this *Webcasting IV* proceeding, and — if accepted — would create massive regulatory distortions in the music industry and immense administrative difficulties.

I. SECTION 114(F)(2)(B) DOES NOT PERMIT DISTINCTIONS AMONG COPYRIGHT OWNERS

A. As iHeartMedia and Others Demonstrated, the Text, Structure, and Purpose of Section 114(f)(2)(B) Require that Rates and Terms Set by the Judges Apply Uniformly to All Copyright Holders

Section 114(f)(2)(B) states that "[t]he *schedule*" — singular — "of reasonable rates and terms" that the Judges establish "shall . . . be binding on *all copyright owners* of sound recordings and entities performing sound recordings." 17 U.S.C. § 114(f)(2)(B) (emphasis added). While Section 114(f)(2)(B) thus provides for a single schedule for all copyright owners, Congress expressly required the Judges to distinguish within that schedule among statutory services. *See id.* (providing that the schedule "shall distinguish among the different types of eligible nonsubscription transmission services"). Congress, moreover, gave the Judges specific criteria to apply in distinguishing among statutory services. *See id.* It follows that the absence of both express authorization — and guiding criteria — to set different rates for different copyright holders is clear evidence that Section 114 *precludes* the Judges from doing so. *See* iHeartMedia Br. at 1; Pandora Br. at 2-3; Sirius XM Br. at 6-9; A2IM Br. at 6.

Moreover, other provisions of Section 114 confirm Congress "knew how to distinguish between" copyright owners when it wanted to, supporting the conclusion that Congress "chose not to do so in" Section 114(f)(2)(B). *Department of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 921 (2015); *see* iHeartMedia Br. at 2-3 (comparing § 114(d)(2) and § 114(d)(3)(A)); Sirius XM Br. at 9-11.

Setting different rate schedules for different classes of copyright owners is also incompatible with Congress's expectation that a single entity could effectively represent the interests of all copyright holders. *See* iHeartMedia Br. at 1-2; A2IM Br. at 4-5. If it were permissible for the Judges to set different rate schedules for different classes of copyright

owners, SoundExchange would find it impossible to represent all copyright owners — as its inability to take a position on the referred question confirms. *See* SoundExchange Br. at 1. As a result, more copyright owners would find it necessary to participate in *Webcasting* proceedings, *see* A2IM Br. at 4-5, 13-14, increasing the costs for copyright owners and services both in setting and applying the statutory rates, *see id.* at 4-5. Yet Congress created compulsory licenses for copyrighted material to avoid "prohibitively high" "transaction costs." *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 602 (D.C. Cir. 1988); *see* Final Rule and Order, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084, 24102 (May, 1, 2007) ("*Webcasting II*") ("Statutory licenses are about administrative efficiency."); *see* Pandora Br. at 4-6; Sirius XM Br. at 10-11, 16-17.

B. Universal and Sony's Arguments Find No Support in the Statute's Text or Structure

Universal and Sony argue that Congress's failure expressly to prohibit the Judges from making distinctions among copyright owners implicitly delegates such authority. *See* Universal/Sony Br. at 3-4. As shown above, well-established principles of statutory construction compel the contrary conclusion: that Congress's decision not to provide express authority to set different rates for different copyright holders precludes the Judges from doing so. Where — as is the case here — Congress decides not to grant authority in one section of a statute that it has granted in another, the "omission says much." *Huerta v. Ducote*, 792 F.3d 144, 152 (D.C. Cir. 2015).[1]

[1] *See, e.g.*, *Huerta*, 792 F.3d at 152 (an express jurisdictional limitation in the proceeding subsection showed that the omission of an express jurisdictional limitation in the subsection at issue was intentional); *Russello v. United States*, 464 U.S. 16, 22-23 (1983) (an express restriction on the meaning of the word "interest" in the proceeding subsection evidenced that the omission of an express restriction in the subsection at issue was intentional).

Universal and Sony fare no better in asserting that five features of Section 114 support its position that the Judges can set different rate schedules for different copyright owners that would take into account their "real-world" ability "to command" higher rates — that is, their market power. Universal/Sony Br. at 4. As shown below, Universal and Sony are wrong as to each. None permits the Judges to set different rates for different copyright owners, let alone to set higher rates for copyright owners with market power, thereby enshrining — and, indeed, bolstering — that market power.[2]

Universal and Sony note that Section 114(f)(2)(B) uses the phrase "rates and terms" — plural — and contends that Congress must have contemplated that the Judges could set different rates for different copyright holders. *See* Universal/Sony Br. at 6. But, as shown above, Universal and Sony are plucking words out of context. Section 114(f)(2)(B) states that the Judges "shall" determine "[t]he *schedule* of reasonable rates and terms" — *singular* — that will be binding on "*all* copyright owners." 17 U.S.C. § 114(f)(2)(B) (emphases added). All copyright holders, therefore, are to be subject to a single "schedule." Moreover, Congress's recognition that the schedule would contain multiple "rates" follows from Congress's directive that the Judges "shall distinguish among" the statutory services, so that different licensees will pay different rates. Indeed, this is the way rates have been set under the statutory license in *every* prior *Webcasting* proceeding. *See* iHeartMedia Br. at 2-3; A2IM Br. at 11-13.

The remainder of Universal and Sony's arguments focus on the standard the Judges are to apply — the "willing buyer, willing seller" standard — and the evidence the Judges are to

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[2] The lead argument in Universal and Sony's brief (at 3-5 & n.5) — that the D.C. Circuit will apply *Chevron* deference to whatever interpretation the Register adopts — is a revealingly awkward invitation to error and, in any event, ignores that no such deference is accorded where, as here, a court can "consider[] the text, structure, purpose, and history of . . . [a] statute" and determine that the statute "reveals congressional intent about the precise question at issue." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 696 (D.C. Cir. 2014).

consider in establishing that single schedule. As shown above, Section 114(f)(2)(B) requires the Judges to set a single "schedule" for "all copyright owners." The analytical approach the Judges are to use in completing that specific task and the evidence they are to consider do not change the nature of the task Congress assigned to the Judges.

In arguing otherwise, Universal and Sony rely heavily on the CARP's observation in *Webcasting I* that Congress "surely understood" that, in the hypothetical competitive marketplace the Judges must consider under the "willing buyer, willing seller" standard, there are "diverse buyers and sellers" that could produce "a range of negotiated rates." Report of the Copyright Arbitration Royalty Panel at 24, *Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Dkt. No. 2000-9 (Feb. 20, 2002). But they omit the next sentence, in which the CARP concluded that Section 114(f)(2)(B) requires a single rate schedule for all copyright owners: "Accordingly, the Panel construes the statutory reference to rates that 'most clearly represent the rates . . . that would have been negotiated in the marketplace' as the rates to which, absent special circumstances, most willing buyers and willing sellers would agree." *Id.* at 25.

Moreover, nothing in Section 114 permits the Judges to adopt a rate structure that allows Universal and Sony — the record labels that "own and license the copyrights in a majority of the sound recordings produced and sold in the United States," Universal/Sony Br. at 1 — to leverage their market power over statutory services. *See* Sirius XM Br. at 11-16. The Judges are to set the rates and terms a willing buyer and willing seller would agree to in a hypothetical *competitive* marketplace, "in which no statutory license exists." *Webcasting II*, 72 Fed. Reg. at 24087. Because the hypothetical marketplace is competitive, rates and terms are not "unduly influenced by sellers' power or buyers' power in the market" and "super-competitive prices or

below-market prices cannot be extracted by sellers or buyers, because both bring comparable . . . market power to the negotiating table." *Webcasting II*, 72 Fed Reg. at 24901; *see* Sirius XM Br. at 10-11.

In this market, moreover, record labels would undoubtedly compete with one another on price, putting downward pressure on the price for plays. Indeed, the record in *Webcasting IV* shows that, in the real-world market, Warner and more than 15,000 independent record labels are competing on price to obtain the promotional benefit of additional performances on statutory services. As A2IM, AFM, and SAG-AFTRA — organizations that represent broad coalitions of independent record labels and artists — candidly explained: "So if there was a higher rate for some owners, those owners might not even want a higher statutory rate because the service[s] might then play more streams of a repertoire of a competitor that was granted a lower rate. This could potentially reduce the revenue that a label could earn from its copyrights, even with a higher statutory rate." A2IM Br. at 10.

The legislative history of Section 114 confirms that Congress intended for the Judges to shield buyers and sellers from the effects of market power in the real-world market. *See* Sirius XM Br. at 11-16. The House Committee Report for Section 114 states: "If supracompetitive rates are attempted to be imposed on operators, the copyright arbitration royalty panel can be called on to set an acceptable rate." *Digital Performance Right in Sound Recordings Act of 1995*, H.R. Rep. No. 104-274, at 22 (Oct. 11, 1995).

Finally, none of the statutory provisions regarding the evidence the Judges are to consider call for comparisons among copyright holders. For example, the directive to consider whether services are promotional or substitutional, *see* 17 U.S.C. § 114(f)(2)(B)(i), is focused on the *use*

of the service, not any differences among copyright owners.[3] Similarly, the statute directs the Judges to compare the "role" of the service with the "role" of the copyright holder; it does not direct the Judges to make comparisons among copyright owners. *Id.* § 114(f)(2)(B)(ii).[4] And in authorizing the Judges to consider voluntarily negotiated direct licenses, *see id.*, the statute calls for consideration of "the relevance and probative value of any agreements *for comparable types of digital audio transmission services*" — not comparable types of different copyright holders.[5]

II. THE RECORD AND BRIEFING IN *WEBCASTING IV* ARE CLOSED AND IT IS FAR TOO LATE FOR UNIVERSAL AND SONY TO SUBMIT A NEW RATE PROPOSAL SEEKING HIGHER RATES FOR THEMSELVES

Even if Section 114(f)(2)(B) could be construed to permit different rates for different copyright owners — and it cannot — Universal and Sony's arguments in favor of setting different (and higher) rates for them comes far too late.

Universal and Sony decided at the outset of this proceeding not to file their own petition to participate and, instead, to let SoundExchange represent their interests in this proceeding along with those of Warner, Merlin, and virtually all other copyright owners.[6] SoundExchange

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[3] Tellingly, Universal and Sony cite no evidence from *Webcasting IV* suggesting that the promotional effect of a service depends on the identity of the copyright owner. In fact, the record in *Webcasting IV* established that services are net promotional for *all* copyright holders and do not substitute for purchases of sound recordings. *See, e.g.*, iHeartMedia Proposed Findings of Fact ¶¶ 96-167. The head of promotion for the number one record label, owned by Universal, testified that promotion remains critical at his label. *Id.* ¶ 98 (quoting Charlie Walk: "a funny thing happens if you don't promote: nothing").

[4] Although Universal and Sony now assert (at 8) that there is "significant variation" in the amount labels invest, the labels actively resisted discovery into that information, and the evidence of investment that was presented in *Webcasting IV* showed that "development of an artist" is something "all of the labels do in more or less the same way." Tr. at 1328:1-5 (Judge Barnett).

[5] *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080, 4084 (Jan. 24, 2008) (emphasis added).

[6] Universal and Sony's contention (at 1) that SoundExchange filed a "joint petition" to participate is inconsistent with SoundExchange's own view of its petition and the Judges' rules.

— along with every other participant — submitted a rate proposal that called for uniform rates for all copyright holders. *See* SX's Proposed Rates and Terms (filed Oct. 7, 2014). In fact, SoundExchange argued that one of the virtues of the statutory license is that it creates an "equal playing field" among record labels "because it is agnostic to the market position of the rights owner in setting the royalty required for a song." Van Arman WDT at 15 (SX Ex. 20).

If Universal and Sony's proposal were adopted, the statutory license would no longer be "agnostic" to the market position of copyright holders and the unequal playing field would create substantial distortions in the music industry. Artists may have incentives to sign with Universal or Sony, rather than independent or artist-owned labels, solely to have access to the higher statutory rates afforded to the two biggest labels. Independent labels may have incentives to merge with Universal or Sony, solely to obtain higher rates for their catalogs. At the same time, statutory services would have the incentive to play fewer high-cost Universal and Sony songs and more songs from independent and artist-owned labels. The ultimate effect on the marketplace of these cross-cutting incentives — including whether they will result in a reduction or increase in the total number of performances on statutory services — is impossible to predict in advance. But it is noteworthy that the unions that represent the artists *oppose* Universal and Sony's proposal, believing that it would, on the whole, be harmful to the music industry to give the two largest labels an artificial regulatory advantage under the statutory license. *See* A2IM Br. at 10-11. In all events, if Congress had intended for the Judges to be able to confer such market-distorting benefits on the largest labels, it surely would have done so explicitly in the

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See SoundExchange's Objections to Testimony and Exhibits at 6 (filed Apr. 20, 2015) ("members [are] not . . . parties"); *see also* 37 C.F.R. § 351.1(b)(ii) (requiring that a joint petition to participate "list" each of the "participants to [a] joint petition"). However, iHeartMedia has no objection to the Register's consideration of the submissions of Universal and Sony or A2IM and the unions, which were attached to the filings of SoundExchange, which is a participant.

statute and provided the Judges with guidance on how to set different rates for different copyright holders.

But because every participant proposed a uniform rate for all copyright holders, no participant had reason to submit fact and expert evidence setting forth the marketplace distortions that would result from setting different rates for different copyright holders. For the same reason, no party had reason to submit fact and expert evidence substantiating all of the administrative difficulties that would make such multiple rates unworkable. *See* iHeartMedia Br. at 3. Pandora and Sirius XM, as they note, have identified only some of the many administrative issues that would be raised by a statutory license that differentiated among copyright holders. *See* Pandora Br. at 5-6; Sirius XM at 16-17. The evidentiary record was closed on June 3, 2015. *See* Tr. at 7660:16 (Judge Barnett); 37 C.F.R. § 351.12. Proposed findings of fact and conclusions of law were filed long ago, and the statutory deadline for decision is fast approaching. *See* 17 U.S.C. § 803(c)(1).

The Judges should therefore make a decision based on the proposals of the participants and the evidence admitted into the record.[7] That record includes voluntary direct license agreements that Warner, 27 independent labels, and more than 15,000 Merlin members have entered with statutory services at rates far below not only the *Webcasting III* rates but also below the Pureplay Settlement rates that apply to the overwhelming majority of statutory service performances. Universal and Sony's dissatisfaction with SoundExchange's legal strategy and the record compiled during the proceeding is no basis for allowing them to change course at this late date. Indeed, it would be fundamentally unfair to permit them to do so, when no other party

[7] *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25394, 25410-412 (May 8, 1998) (precluding the Judges from adopting a rate-setting methodology on which no party had offered evidence or argument).

was given the opportunity to submit evidence of the massive market distortions and administrative difficulties that would attend any attempt to set different rates for different copyright owners.

Even SoundExchange acknowledges that it would be inappropriate for the Judges to set multiple rates for copyright owners without "an opportunity to file additional briefs," because Universal and Sony's eleventh-hour change of position "raise[s] issues no party has addressed." SoundExchange Br. at 1-2. SoundExchange, however, dramatically understates the magnitude of what would be required. The parties would need not only to file additional briefs, but also to collect and submit additional factual and expert evidence — including through written discovery and depositions — that no party previously had any reason to gather or submit. A further hearing would then have to be held at which the new fact and expert witnesses would testify and be subject to cross-examination. It would be prejudicial to require the participants to perform all of those tasks in the very limited time remaining before the Judges must issue their ruling simply because Universal and Sony now have doubts about the strength of the case SoundExchange put forward on their behalf.

CONCLUSION

For these reasons, iHeartMedia submits that the best reading of the statute is one that establishes rates and terms without regard to specific characteristics of particular licensors.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing Reply Brief Regarding the Novel Legal Questions Referred to The Register on Different Licensor Rates of iHeartMedia, Inc. has been served on this 9th day of October 2015 on the following persons:

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